APPEAL NO. 93303

A contested case hearing was held in (city), Texas, on February 26, 1993, with (hearing officer) presiding, to determine whether the appellant (claimant) sustained a back injury in the course and scope of her employment, the extent to which claimant had disability, and whether claimant had good cause for failing to timely file her claim with the Texas Workers' Compensation Commission (Commission). While the hearing officer concluded that claimant did sustain a compensable back injury on (date of injury), and did have disability from June 28 to July 2, 1991, he further concluded that claimant did not have good cause for failing to timely file her claim for compensation pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.03 (Vernon Supp. 1993) (1989 Act). In requesting our review of the adverse conclusion that she failed to show good cause for her untimely claim, claimant generally reargues the evidence and also asserts that had her employer filed its written report of her injury with the Commission and respondent (carrier), and sent her a copy, all as required by Tex. W.C. Comm'n, TEX. ADMIN. CODE § 120.2 (Rule 120.2), she would have timely filed her claim. Claimant's appeal bears a certificate showing service upon the carrier by certified mail on April 16, 1992. Carrier's response, dated and received by the Commission on May 18, 1993, appears untimely pursuant to Article 8308-6.41(a) and Rule 143.3.

DECISION

Finding the evidence sufficient to support the hearing officer's determination that claimant failed to show good cause for the untimely filing of her claim, we affirm.

Claimant testified that on (date of injury), while employed by the (Employer) as a summer counselor working with children, she hurt her back when she picked up a child who was being disruptive in Employer's child care room where she worked. Claimant said that late in the afternoon before her departure she obtained an accident report form from a fellow employee, completed the form, and left it on "his desk," apparently referring to the desk of her immediate supervisor, (Mr. C), who was elsewhere at the time. According to the evidence, Mr. C was not employed by Employer at the time of the hearing. Claimant introduced an exhibit entitled "Accident Report" which bore her signature and the date "6/28/91." It contained a recital of her picking up the disruptive child and indicated she hurt her back but did not have pain and was unaware she was hurt until she "sat down in a chair in the pool and started to get up." Claimant further testified that she spoke about her injury and the accident report with Employer's day care director, (Ms. P), at the time she was leaving work that evening and that Ms. P suggested she go to the hospital where "they have workers' comp." Claimant said she declined that suggestion and the next day went to her own doctor who gave her medication and took her off work for three days. She introduced a note from (Dr. H), dated June 29, 1991, which stated she could return to work on July 2nd and should avoid heavy lifting for two weeks. Dr. H's notes of that visit stated claimant, then 52 years of age, was trying to lift a child and began to experience back pain two hours later. Dr. H diagnosed low back strain and planned conservative treatment. A statement from claimant's husband corroborated her testimony concerning Ms. P helping claimant out

to the husband's vehicle that evening, as well as claimant's testimony concerning her continued back pain.

Ms. P testified that while claimant had discussed the incident with the unruly child with her on June 28th, she was unaware of any injury to claimant and that neither claimant nor any other employee ever reported such an injury to her. Ms. P also denied having assisted claimant out the door that evening and having suggested she go to a doctor. She also stated that claimant had back "discomfort" prior to June 28th and carried a pillow with her. Respecting claimant's accident report form, Ms. P said it was not an Employer's form though she had seen such a form at other day care centers and at seminars and workshops. When it was pointed out to claimant that the form--which on its face appeared to be designed for the report of an injury to a child at a school or other facility--made a reference to "not holding school or church responsible," claimant nevertheless insisted she had obtained the form at Employer's front office. Ms. P also testified that while she saw the completed form in claimant's personnel file, it did not bear the stamp that all such filed documents customarily do.

(Ms. G), who at the time was Employer's chief executive officer, testified that pursuant to Employer's procedures, she received both oral and written reports of all employee injuries; that she received no oral or written notice of claimant's injury; that on July 7, 1991, when she discussed with claimant the latter's request for an indefinite emergency leave commencing on July 3rd to visit an ill relative, claimant never mentioned any such injury; and that she had never seen the "Accident Report" which she said was not an Employer form.

Claimant also testified that she last worked for Employer on July 2, 1991, because she had to travel with her husband to a distant state on July 3rd to visit her critically ill mother-in-law. She said that Employer denied her request for an unpaid indefinite leave and she was told Employer's policies did not permit granting such leave to a probationary employee. Ms. G testified that claimant, a seasonal employee, resigned; however, claimant said she felt the denial of her leave request was tantamount to being "fired." Claimant said she and her husband made the two-day drive and sometime later returned. She said the drive was very painful due to her back injury, that she has had back pain "off and on" from the date of the injury which has gotten progressively worse, that a small bone keeps "popping out," and that she has had medical treatment since the date of injury. She said her medical treatment was paid for by her husband's group health insurance carrier. After returning from the visit to her mother-in-law, claimant did volunteer church work for the remainder of the summer and commenced some college courses in the fall. She said she discontinued the courses after a few months because of the back pain she had to endure in riding buses and carrying books up and down stairs. She said she became severely depressed over not being able to complete her education and underwent depression therapy.

Claimant's claim form was dated September 29, 1992. Claimant testified she did not file her claim until September 1992, some 15 months after her injury, because she had never been injured before, had never filed a workers' compensation claim before, and was thus unaware of her rights. She could not recall any notices about workers' compensation being posted at her workplace. Ms. P, however, testified such notices were posted in two locations. Claimant conceded that while she was provided an employee's handbook and had consulted it concerning her request for leave, she had not looked for information concerning workers' compensation claims.

Claimant also testified she did not realize the severity of her injury. Her medical records contained an "urgent care record," dated October 2, 1991, which reflected that claimant complained of severe back pain which had gotten progressively worse since seeing Dr. H "on July 3rd," and the assessment was "right lumbar strain." An x-ray report of October 3, 1991, indicated "early changes of degenerative spondylosis" and stated that lumbar muscle spasm could not be excluded. Claimant was seen again on February 7, 1992, for complaints of back pain and was assessed to have "lumbar strain with intermittent pain." An undated "Triage Progress Note" bearing date stamps of September 28, 1992, stated that claimant was now having numbness to her legs and reflected a "job injury." She was seen on September 29, 1992, by Dr. Gardner who noted a year long history of episodic right hip and low back pain with pain now radiating to her right leg. Dr. G referred claimant for an EMG. An EMG and nerve conduction velocity report of November 24, 1992, stated that the nerve conduction studies were normal while the EMG report noted motor unit changes in the right L4 and L5 dermatomes. A CT scan report of December 17, 1992, showed a probable broad-based posterior bulging of the L4-5 disc with questionable indentation on the anterior aspect of the thecal sac.

Claimant stated that her depression cleared up by April 1992 and that she did volunteer church work including home visits and fundraising. In June 1992, claimant traveled to Europe for 12 days. She said her back hurt her severely during the lengthy plane trips, that she had to use a pillow, that she had pain throughout the trip and was on Motrin, and that she has had pain ever since the trip and knew it was from her work-related injury. After that trip, claimant continued with her church work and kept trying to improve her physical conditioning. Asked why she did not file a claim after returning from the trip in June 1992, claimant said she did not think she had any rights since she had been dismissed from her employment. Ms. G testified that claimant was not terminated by employer but voluntarily resigned. Claimant also said she has not sought employment in her field (after school education) because such work requires the lifting of children. She also said that no doctor has told her she cannot work and that she herself has not said she cannot work.

The hearing officer found, among other things, that "[o]n September 29, 1992, claimant gave notice of her injury and made her claim for compensation which was longer than a year after her injury suffered on (date of injury)," and that "[d]uring mid June 1992, for

12 days, the Claimant traveled to, around Europe and returned to the United States sitting for extended periods of time and experiencing great pain knowing that she had hurt her back at work on (date of injury)." The hearing officer then reached the conclusion that "[t]he Claimant knowing that she was suffering enormous pain for extended periods of time from an injury she suffered at work did not have good cause for her failure to file a claim prior to the expiration of one year in which she was to file a claim for compensation; therefore, the Claimant failed to file her claim for compensation in a timely manner and the Carrier is relieved of liability under this act. (Citation omitted.)"

Article 8308-5.01(b) provides that an employee must file with the Commission a claim for an injury not later than one year after the date of the occurrence of the injury. Article 8308-5.03 provides that an employee's failure to file a claim as required by Article 8308-5.01(b) relieves the employer and its carrier of liability under the 1989 Act unless good cause exists for the failure to timely file the claim, or the employer or carrier does not contest the claim. In this case, the carrier contested the claim on October 19, 1992, on the ground that claimant failed to timely file her claim as required by Article 8308-5.01(b).

Claimant had the burden to prove she had good cause for not timely filing her claim and we view the evidence as sufficiently supporting the hearing officer's determination that she failed to prove such good cause. The test for permissible delay in filing a workers' compensation claim is whether the claimant acted as a reasonably prudent person would have acted under the circumstances. *See* Texas Casualty Ins. Co. v. Beasley, 391 S.W.2d 33 (Tex. 1965); Providence Lloyds Ins. Co. v. Smith, 828 S.W.2d 328 (Tex. App.-Austin 1992, writ denied). In Beasley the claimant filed his workers' compensation claim for a back injury 19 months after the injury date and the only question at trial was whether he had shown good cause for his untimely filing. The court observed that the claimant "was charged with the duty of prosecuting his claim with that degree of diligence which a reasonably prudent person would have exercised under the same or similar circumstances," and that the question was one of fact for the fact finder. The court further noted that such duty of diligence continues up to the date the claim is filed. Beasley, *supra*, at 34-35. While an injured employee's belief that an injury is not serious can amount to good cause (*See* Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993 and cases cited therein), the evidence in this case supported the hearing officer's not crediting such belief by claimant as "good cause." Claimant's own testimony stated that her back pain, which was intermittent at first, became progressively worse over time, and that in June 1992, when she traveled to Europe, it became severe and thereafter became constant. Yet, she did not file her claim until September 29th. As for claimant's other "good cause" assertion that she was unaware of her workers' compensation rights, as we noted in Appeal No. 92657, *supra*, the Texas courts have consistently held that an employee's ignorance of Workers' Compensation Act provisions does not constitute good cause.

There was no disputed issue at the hearing concerning claimant's allegation that her Employer failed to timely file the employer's notice of injury and we need not address the matter here other than to note that Article 8308-5.05(e) provides for an administrative sanction for noncompliance with the reporting requirements of Article 8308-5.05.

The hearing officer is the sole judge of the weight and credibility of the evidence (Article 8308-6.34(e)); and where there is sufficient evidence to support the hearing officer's determinations, as there is in this case, we do not disturb the decision. We are satisfied, after a careful review of the record, that the evidence sufficiently supports the hearing officers' findings and conclusions and that they are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660; Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge